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Supreme Court, U.S.
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No. 1

In The

Supreme Court of the United States

GEORGE McGINEST,

Petitioner,

v.

GTE SERVICE CORP., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the failure to raise an affirmative defense in a responsive pleading constitutes a forfeiture under Federal Rule of Civil Procedure 8(c) and prevents reliance upon that defense in a dispositive motion.

2. Whether a defendant's waiver of a *res judicata* defense – through acquiescence to claim splitting (Restatement (Second) of Judgments § 26(1)(a)) – can only be established where the plaintiff has suffered some prejudice.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding are George McGinest, individually, and Verizon California, Inc. (formerly known as GTE California, Inc.), which is a wholly-owned subsidiary of Verizon Corporation (a New York corporation with its principal place of business in New York), which, in turn, is a wholly-owned subsidiary of Verizon Communications, Inc. (a Delaware corporation with its principal place of business in New York).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner George McGinest respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case filed on August 30, 2007.

OPINION BELOW

The district court's order granting respondent's motion for summary judgment is not published. This unpublished order is reprinted in the Appendix to this Petition at pages 9-28. The Ninth Circuit Court of Appeal's unpublished opinion affirming the judgment is reprinted in the Appendix at pages 1-8.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on August 30, 2007. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 8(c) provides:

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and

> award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Restatement (Second) of Judgments section 26 provides in relevant part:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the Plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the Plaintiff may split his claim, or the defendant has acquiesced therein;. . . .

STATEMENT OF THE CASE[1]

On December 23, 1999, [Petitioner] George McGinest filed a federal action naming his employer GTE Service Corp. (nka Verizon California, Inc.) (hereinafter "Verizon" or ["Respondent"]) and a supervisor[]. [Petitioner], who is African-American, alleged violations of Title VII. The day before filing the federal lawsuit, [Petitioner] filed suit in the Superior Court of Los Angeles County naming the same two defendants and also alleging discrimination, but in violation of the California Fair Employment and Housing Act ("FEHA"). [In neither action did Respondent raise a *res judicata* affirmative defense.] On appeal, [Petitioner] does not dispute that the two cases split a single cause of action. The only issue is whether Verizon waived its opportunity to raise a *res judicata* defense.

On October 11, 2000, the district court granted summary judgment dismissing the federal case. On January 28, 2002, the state court granted summary judgment dismissing the state case. The state court ruling was also based on the evidence presented on summary judgment; it did not rest on *res judicata* based on the federal court judgment. In both cases, [Petitioner] appealed the dismissal of the claims against Verizon.

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[1] Except for the bracketed text, the facts and procedure upon which the Ninth Circuit based its opinion are quoted directly from the opinion, which is reprinted in the Appendix to this Petition at pages 2-3.

The first appeal to be ruled on was the federal appeal. The Ninth Circuit affirmed the dismissal of the retaliation claim, but remanded the hostile environment and promotion discrimination claims based on there being genuine disputes of material fact. See *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 2004).

In the state appeal, the California Court of Appeal affirmed the grant of summary judgment based, inter alia, on the lack of genuine issue of material fact. See *McGinest v. Verizon California, Inc.*, No. B159252, 2004 WL 1510294 (Cal.Ct.App.2d Dist. July 7, 2004) (unpublished). In federal court, [Respondent] moved for summary judgment based on the *res judicata* effect of the final state court judgment. On March 29, 2005, the district court granted [Respondent's] motion for summary judgment.

The court of appeals affirmed, finding Respondent had not waived its *res judicata* defense. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

In its decision, the United States Court of Appeals for the Ninth Circuit held that Respondent had not waived its *res judicata* defense even though Respondent had (1) failed to raise it as an affirmative defense, and (2) acquiesced in Petitioner simultaneously maintaining separate actions, based on the same claim, in federal and state court. As we now

explain, the Ninth Circuit's decision creates an intercircuit conflict which threatens the consistency of federal law and should be settled by this Court. See, e.g., Sup. Ct. R. 10(a); *TRW Inc. v. Andrews,* 534 U.S. 19, 26 [122 S.Ct. 441, 151 L.Ed.2d 339] (2001); *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602 [121 S.Ct. 1835, 149 L.Ed.2d 855] (2001) (Certiorari granted to review unpublished *per cruiam* opinion to resolve intercircuit conflict).

First, Federal Rule of Civil Procedure 8(c) requires that affirmative defenses, including *res judicata*, must be raised in a timely answer. A defendant which fails to do so may later amend its pleading (Fed. Rule Civ. Proc. 15(a)), and test that defense through a motion for summary judgment (Fed. Rule Civ. Proc. 56(b)-(c)). Notwithstanding, the Ninth Circuit ruled that "[a]s long as the plaintiff is not prejudiced, affirmative defenses that were not pleaded in an answer may be raised for the first time on summary judgment." Pet. App. at 6. As the District of Columbia Circuit logically reasoned, the approach taken by the Ninth Circuit subtly altered "the structure dictated by Rules 8(c) and 15(a)." *Harris v. Secretary, U.S. Dept. of Veteran Affairs,* 126 F.3d 339, 344 (D.C. Cir. 1997). It does so by relieving a party "of the need to request amendment," which in turn allows parties "to omit affirmative defenses in pleadings strategically, in violation of the notice purpose." *Id.,* at 344-45. Additionally, by "automatically permitting [the] late raising of affirmative defenses where

no prejudice has occurred[, the Ninth Circuit's analysis] reduces the multifarious reasons for denying leave to amend . . . to the single, non-exhaustive factor of prejudice." *Id.*, at 345.

Second, California recognizes that a *res judicata* defense can be waived if "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein. . . ." Restatement (Second) of Judgments § 26(1)(a). Interpreting this provision, the Ninth Circuit added the requirement that waiver will be found only where the plaintiff has "suffered some prejudice." Pet. App. at 7. The Ninth Circuit's ruling cannot stand, for among other reasons, *res judicata* protects a defendant from being harassed by repetitive actions based on the same claim. The doctrine has no application where the defendant consents, in express words or otherwise, to the splitting of the claim. A defendant's waiver is not determined by the prejudice a plaintiff suffers, and no other court has imposed such a requirement.

For these and other reasons discussed below, Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

LEGAL DISCUSSION

I. THE COURT OF APPEALS' FINDING THAT RESPONDENT DID NOT WAIVE ITS *RES JUDICATA* DEFENSE CREATES AN INTERCIRCUIT CONFLICT.

A. Under Both Federal And California Law, A *Res Judicata* Defense Can Be Waived.

Under the Full Faith and Credit Act, Title 28 U.S.C. § 1738, a federal court must give the same preclusive effect to a state court judgment as would another court of that state. *Parsons Steel v. First Alabama Bank,* 474 U.S. 518, 523 [106 S.Ct. 768, 88 L.Ed.2d 877] (1986); *Migra v. Warren City School Dist. Bd. Of Ed.*, 465 U.S. 75, 81 [104 S.Ct. 892, 79 L.Ed.2d 56] (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 465 [102 S.Ct. 1882, 72 L.Ed.2d 262] (1982); see also, e.g., *Noel v. Hall*, 341 F.3d 1148, 1160 (9th Cir. 2003).

Section 1738 does not allow federal courts to employ their own rules regarding *res judicata* in determining the effect of state judgments. *Kremer v. Chemical Constr. Corp., supra*, 456 U.S. at 482. Rather, "the statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 [105 S.Ct. 1327, 84 L.Ed.2d 274] (1985); see also, e.g., *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988) ("This Act requires federal courts to apply the *res*

judicata rules of a particular state to judgments issued by courts of that state").

In California, "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Restatement (Second) of Judgments § 19; *Kelly v. Vons Companies, Inc.*, 67 Cal.App.4th 1329, 1335 (1998). Significantly, as discussed below, a *res judicata* defense can be waived in two independent ways: (1) where a defendant fails to raise it as an affirmative defense; and (2) where the defendant acquiesces in the claim splitting.

On each of these bases, the Ninth Circuit should have precluded Respondent's reliance on a *res judicata* defense. Its failure to find waiver, and the inconsistent ways in which courts have applied these theories of waiver, compel intervention by this Court.

B. The Court Of Appeals Created An Intercircuit Conflict By Granting A Motion For Summary Judgment On The Basis Of *Res Judicata*, An Affirmative Defense Never Pleaded By Respondent In Its Answer.

In *Arizona v. California*, 530 U.S. 392 [120 S.Ct. 2304, 2316, 147 L.Ed.2d 374] (2000), this Court confirmed that defenses, including *res judicata*, must be timely raised in an answer. *Id.*, at 410, citing Fed. Rule Civ. Proc. 8(c) ("[R]es judicata [is] an affirmative defense ordinarily lost if not timely raised"). The

purpose of Rule 8(c)'s pleading requirement is to give the opposing party notice of the defense and an opportunity to develop evidence establishing the inapplicability of the defense. *Blonder-Tongue Lab v. University of Illinois Foundation*, 402 U.S. 313, 350 [91 S.Ct. 1434, 1453, 28 L.Ed.2d 788] (1971); see also, e.g., *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476 [118 S.Ct. 921, 139 L.Ed.2d 912] (1998).

A party which has failed to plead an affirmative defense will, nonetheless, have the opportunity to do so. Rule 15(a), in pertinent part provides, that a party may amend its pleading "as a matter of course" before a response or within 20 days for a pleading to which no responsive pleading is permitted. "Otherwise a party may amend [its] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. Rule Civ. Proc. 15(a). This Court has confirmed that "[i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 [83 S.Ct. 227, 9 L.Ed.2d 222] (1962); see also, e.g., *United States v. Hougham*, 364 U.S. 310, 316 [81 S.Ct. 13, 5 L.Ed.2d 8] (1960).

Once raised, a defense can be tested through a motion for summary judgment. Fed. Rule Civ. Proc.

56(b)-(c); see also, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose"). Thus, as explained by *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986), "if the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." (*Id.*, at 1194; see also, e.g., *Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 36 (1st Cir. 1998).

Here, even though Respondent failed to raise in its answer a *res judicata* defense, it based a motion for summary judgment on that affirmative defense. The Court of Appeals nonetheless affirmed, explaining "[a]s long as the plaintiff is not prejudiced, affirmative defenses that were not pleaded in an answer may be raised for the first time on summary judgment." Pet. App. at 6, relying in part on, *Magana v. Com. of Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997).

The procedural approach employed by the Ninth Circuit has been justly criticized by other courts for failing to adhere to Rules 8(c) and 15(a). As explained in *Harris v. Secretary, U.S. Dept. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997), where a party is permitted to raise an affirmative defense by summary

judgment motion, Rules 8(c) and 15(a) have been effectively restructured in two ways:

> First, it apparently relieves the moving party of the need to request amendment, and the District Court of the need to state and explain its grant of leave to amend, so long as the opposing party does not show prejudice. This change allows parties to omit affirmative defenses in pleadings strategically, in violation of the notice purpose. It will often prove difficult for a party to support a claim of prejudice in circumstances involving only inconvenience or surprise. And, by the time the opposing party raises the prejudice claim, a strategic advantage may already have been gained by the party who failed to amend its pleading. By contrast, if the District Court systematically follows the procedural structure required by Rules 8(c) and 15(a), it can conduct its own inquiry in every case into the circumstances of the delay, and need not rely solely on a convincing showing of prejudice by one party. It likely will articulate the basis for the amendment, and will not simply approve it as a matter of course.
>
> Second, automatically permitting late raising of affirmative defenses where no prejudice has occurred reduces the multifarious reasons for denying leave to amend envisioned by the Court in *Foman* to the single, nonexhaustive factor of prejudice. Improper circumstances such as 'undue delay, bad faith or dilatory motive on the part of the movant, [or] repeated failure to cure deficiencies by

amendments previously allowed,' *Foman*, 371 U.S. at 182, . . . do not necessarily result in quantifiable prejudice to an opposing party. Nonetheless, taken collectively rather than individually, they may undercut the fairness and efficiency of litigation generally. Strategic or merely lazy circumventions of a legal process grounded in a sound policy have the effect of eroding the regularized, rational character of litigation to the detriment of practitioners and clients alike.

When an opposing party does receive notice of a previously unpled defense when a dispositive motion is filed, it lacks the advance notice required by Rule 8(c) that would have enabled it to develop factual and legal defenses fully. Although an opposing party may introduce affidavits in response to a motion for summary judgment, Fed.R.Civ.P. Rule 56(c), as Appellant did in this case, affidavits will not always suffice to provide adequate evidence for the defenses proposed. Frequently, mounting a proper defense will necessitate further discovery, which may not be possible in the time allotted to respond to the motion. Rule 15(a) authorizes the District Court to allow amendment, but this does not mean it would be unduly formalistic for the District Court to deny amendment to a strategic litigant who intentionally neglected to plead a defense. To the contrary, denying leave to amend to such a litigant would

> serve, not impede, the interests of substantive justice.

Harris, supra, 126 F.3d at 344-45.

The approach taken by the District of Columbia Circuit has been followed by other federal and state courts. See, e.g., *In re Cumberland Farms, Inc.*, 284 F.3d 216, 227 (1st Cir. 2002); *Ashe v. Corley*, 992 F.2d 540, 545 n. 7 (5th Cir. 1993); *Carr v. O'Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999); *Funk v. F&K Supply, Inc.*, 43 F.Supp.2d 205, 221-222 (N.D.N.Y. 1999); *Jim's Steak House, Inc. v. City of Cleveland*, 81 Ohio St.3d 18, 20-21, 688 N.E.2d 506 (1998).

In sum, this Court should grant certiorari to resolve the intercircuit conflict by addressing whether a party's failure to raise an affirmative defense in a responsive pleading constitutes a forfeiture under Rule 8(c)and prevents reliance upon that defense in a dispositive motion.

C. The Court Of Appeals Created An Intercircuit Conflict By Granting A Motion For Summary Judgment On The Basis Of *Res Judicata*, When Respondent Acquiesced To Parallel Federal And State Proceedings.

Even if Respondent had timely raised a *res judicata* defense, California recognizes that waiver – as set forth in Restatement (Second) Judgments Section 26 – provides an important exception to its general application. *Hamilton v. Asbestos Corp., Ltd.*,

22 Cal.4th 1127, 1146-1147 (2000); *Allstate Ins. Co. v. Mel Rapton, Inc.*, 77 Cal.App.4th 901, 909 (2000).

According to the Restatement, the general rule precluding claim splitting does not apply if "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein. . . ." Restatement (Second) of Judgments § 26(1)(a).

As Comment (a) to Section 26(1) further explains:

> Consent to or acquiescence in splitting (Subsection (1)(a)). A main purpose of the general rule stated in § 24 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim.
>
> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim. . . .

Id., Comment a.

As the Restatement recognizes, under certain circumstances, "[t]he conduct of a defendant faced with parallel litigation may fairly be interpreted as at least tacit consent to proceeding with separate actions, abandoning a possible claim preclusion defense in the action that proceeds after the first judgment." 18 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 4404, at 52-53 (2d ed. 2002 & Supp.2004); see also, e.g., James Wm. Moore et al., Moore's Federal Practice § 131.24[1] (3d ed. 1997) ("Acquiescence . . . occurs when a defendant allows two simultaneous actions on the same claim to proceed without objection").

Here, the Ninth Circuit expressly recognized that "the *Restatement* indicates that waiver can be founded simply on a defendant's failure to raise any sort of objection to there being two pending lawsuits." Pet. App. at 7. Nonetheless, citing *Clements v. Airport Authority of Washoe County,* 69 F.3d 321 (9th Cir. 1995), the court engrafted the additional requirement that waiver will only be found where the plaintiff has "suffered some prejudice." Pet. App. at 7. The Ninth Circuit's holding is problematic for three reasons:

First, *Clements* never established a requirement of prejudice. To the contrary, it adhered to the Restatement, explaining: "There is [an] important exception to the general rule regarding the preclusive effect of state court judgments in federal court which controls the outcome of the issue here – waiver. Claim preclusion is an affirmative defense which may be deemed waived if not raised in the pleadings. A main

purpose behind the rule preventing claim splitting is 'to protect the defendant from being harassed by repetitive actions based on the same claim.' Many commentators reason that where a defendant acquiesces in the split, the rule should be inapplicable. We agree." *Clements, supra,* 69 F.3d at 328, citations omitted.

Second, a requirement of prejudice makes no sense. *Res judicata* protects a defendant from being harassed by repetitive actions based on the same claim. The doctrine has no application where the defendant consents, in express words or otherwise, to the splitting of the claim. Restatement (Second) Judgments § 26(1)(a), Comment a. As such, whether a defendant has waived a right turns on his own intentions and actions. See *United States v. Olano*, 507 U.S. 725, 733 [113 S.Ct. 1770, 123 L.Ed.2d 508] (1993) (Whether a defendant has "waived" a right turns on whether he has engaged in the "'intentional relinquishment or abandonment of a known right'"). A defendant's waiver is not determined by the prejudice a plaintiff suffers.

Third, the Ninth Circuit's requirement of prejudice conflicts with the holdings of numerous decisions in which a *res judicata* defense was found to be waived on the sole basis that the defendant implicitly consented to the splitting of the plaintiff's claim by allowing dual prosecution in state and federal court. See, e.g., *Rosado v. General Electric Circuit Breakers*, 805 F.2d 1085, 1087 (1st Cir. 1986) (federal age discrimination claim not barred where defendant did not

object to separate trial of state wrongful discharge claim); *Klipsch, Inc. v. WWR Technology, Inc.*, 127 F.3d 729, 734-35 (8th Cir. 1997) (district court erred in granting summary judgment in favor of defendant on *res judicata* defense because defendant had acquiesced in the splitting of plaintiff's claim); *Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995); *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988), cert. denied, 488 U.S. 948, 109 S.Ct. 378, 102 L.Ed.2d 367 (1988); cf. *Cagan v. Village of Angel Fire, A.L.*, 137 N.M. 570, 581, 113 P.3d 393 (2005).

In sum, this Court should grant certiorari to resolve the intercircuit conflict by addressing whether a defendant's waiver of a *res judicata* defense can be found even though the plaintiff has suffered no prejudice.

CONCLUSION

For the foregoing reasons, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

Dated: November 20, 2007

Respectfully submitted,

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United States Court of Appeals, Ninth Circuit.
George McGINEST, Plaintiff-Appellant,
v.
GTE SERVICE CORP., Defendant-Appellee.
No. 05-55754.

Argued and Submitted May 10, 2007.
Filed Aug. 30, 2007.

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Appeal from the United States District Court for the Central District of California; Christina A. Snyder, District Judge, Presiding. D.C. No. CV 99-13432-CAS.

Before PREGERSON* and PAEZ, Circuit Judges, and HART**, District Judge.

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* After oral argument, Judge KLEINFELD recused himself. Judge PREGERSON was drawn by the Clerk of the Court to replace Judge KLEINFELD pursuant to G.O. § 3.2.h. Judge PREGERSON has read the briefs and listened to the tape recordings of the oral argument.

** The Honorable William T. Hart, United States Senior District Judge for the Northern District of Illinois, is sitting by designation.

MEMORANDUM

One cause of action for employment discrimination split into two suits – one filed in state court and one in federal court – raises a question of waiver of *res judicata* when the first suit went to final judgment.

On December 23, 1999, Plaintiff George McGinest filed a federal action naming his employer GTE Service Corp. (nka Verizon California, Inc.) (hereinafter "Verizon" or "Defendant") and a supervisor as Defendants. Plaintiff, who is African-American, alleged violations of Title VII. The day before filing the federal lawsuit, Plaintiff filed suit in the Superior Court of Los Angeles County naming the same two defendants and also alleging discrimination, but in violation of the California Fair Employment and Housing Act ("FEHA"). On appeal, Plaintiff does not dispute that the two cases split a single cause of action. The only issue is whether Verizon waived its opportunity to raise a *res judicata* defense.

On October 11, 2000, the district court granted summary judgment dismissing the federal case. On January 28, 2002, the state court granted summary judgment dismissing the state case. The state court ruling was also based on the evidence presented on summary judgment; it did not rest on *res judicata* based on the federal court judgment. In both cases,

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*** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Plaintiff appealed the dismissal of the claims against Verizon.

The first appeal to be ruled on was the federal appeal. The Ninth Circuit affirmed the dismissal of the retaliation claim, but remanded the hostile environment and promotion discrimination claims based on there being genuine disputes of material fact. *See McGinest v. GTE Service Corp.,* 360 F.3d 1103 (9th Cir.2004).

In the state appeal, the California Court of Appeal affirmed the grant of summary judgment based, *inter alia,* on the lack of genuine issue of material fact. *See McGinest v. Verizon California, Inc.,* No. B159252, 2004 WL 1510294 (Cal.Ct.App.2d Dist. July 7, 2004) (unpublished). In federal court, Defendant moved for summary judgment based on the *res judicata* effect of the final state court judgment. On March 29, 2005, the district court granted Defendant's motion for summary judgment.

On appeal, Plaintiff does not dispute that *res judicata* would normally result in the dismissal of his federal case, but argues that Defendant waived that defense here. The *res judicata* effect of a state court judgment is governed by the laws of the state in which the court is located. 28 U.S.C. § 1738; *Manufactured Home Communities Inc. v. City of San Jose,* 420 F.3d 1022, 1031 (9th Cir.2005); *Clements v. Airport Authority of Washoe County,* 69 F.3d 321, 326, 328 (9th Cir.1995). In the present case, that is California law. The issue on appeal, however, is not the

res judicata effect of the California judgment. Instead, the issue is whether Defendant waived its opportunity to raise *res judicata* as a defense in the federal proceeding. In *Clements,* this court noted that waiver is one of the "exceptions" to the general rule that a state court judgment has the same preclusive effect in federal court as the judgment would have in the courts of the rendering state. *Id.* at 328.Thus, the question of whether Defendant waived its *res judicata* defense by failing to expressly plead it as a defense and by acquiescing in Plaintiff's splitting of his cause of action is governed by federal law, not state law. *Id.* Whether the *res judicata* defense was waived is reviewed *de novo. Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 708, 713 (9th Cir.2001).

In *Clements,* this court recognized two potential grounds for finding that the *res judicata* defense is waived. One is that the defense may be waived if not raised in the pleadings. *Id.,* 69 F.3d at 328. The other is that the failure of a defendant to object to the prosecution of split proceedings while both proceedings are still pending can result in a waiver of the defense. *Id.* In *Clements,* 69 F.3d at 328 & nn. 5-6, we followed cases from other circuits and the *Restatement (Second) of Judgments* § 26(1)(a) (1982) ("*Restatement*"), in holding that waiver can occur by the defendant acquiescing in the prosecution of two proceedings.

The *Restatement* provides:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the Plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the Plaintiff may split his claim, or the defendant has acquiesced therein; . . . .

Id. § 26(1)(a) (quoted in *Clements*, 69 F.3d at 328 n. 5).

We held in *Clements* that a claim preclusion (*res judicata*) defense was waived for failing to raise it until three months after oral argument on appeal, which caused prejudice to plaintiffs. 69 F.3d at 328-29. The plaintiffs in *Clements* were prejudiced because they could have attempted to raise the federal claims in their related state case if defendants had earlier objected to the dual proceedings or indicated they would rely on claim preclusion.

Although issue preclusion (collateral estoppel) was also raised for the first time on appeal in *Clements*, and only after the Ninth Circuit requested supplemental briefs, issue preclusion was not held to be waived. *Id.* at 329-30. Unlike claim preclusion which can apply to claims that are part of a cause of action but not actually litigated, issue preclusion can only be based on issues actually litigated. Therefore,

applying issue preclusion did not prejudice the plaintiffs by depriving them of the opportunity to litigate an issue. *Id.* at 330. Also, unlike claim preclusion that generally is concerned with private interests, issue preclusion also involves the public interest of avoiding inconsistent results and conserving judicial resources by not requiring two courts to resolve the same issue. *Id.*

As long as the plaintiff is not prejudiced, affirmative defenses that were not pleaded in an answer may be raised for the first time on summary judgment. *Magana v. Commissioner of Northern Mariana Islands,* 107 F.3d 1436, 1446 (9th Cir.1997); *Camarillo v. McCarthy,* 998 F.2d 638, 639 (9th Cir.1993); *Ahmad v. Furlong,* 435 F.3d 1196, 1201-02 (10th Cir.2006) (collecting cases). *See also Janis v. Commissioner of Internal Revenue,* 461 F.3d 1080, 1085 n. 3 (9th Cir.2006). This includes the affirmative defense of *res judicata.* Cf. *Owens,* 244 F.3d at 713 (*res judicata* raised for the first time on a motion for judgment on the pleadings); *Curry v. City of Syracuse,* 316 F.3d 324, 330-31 (2d Cir.2003) (raising collateral estoppel for the first time on summary judgment). Here, Plaintiff does not contend that he was prejudiced by any delay. Therefore, the *res judicata* defense is not waived simply because Defendant failed to plead it as an affirmative defense. Also, it is not even clear that any significant delay occurred since Defendant could not have succeeded on a *res judicata* defense until after the state judgment became final when the California Supreme Court denied review. Any affirmative defense

pleaded before that time would have been speculative.

While the *Restatement* indicates that waiver can be founded simply on a defendant's failure to raise any sort of objection to there being two pending lawsuits, *Clements* supports that the plaintiff must also have suffered some prejudice in order to apply waiver. Generally, prejudice occurs from the application of *res judicata* where the plaintiff has not had the opportunity to actually litigate claims that were part of the same cause of action, but not actually raised in the first case that went to judgment. In this case, Plaintiff suffered no such prejudice. The FEHA claims that were actually litigated in the state case are essentially the same as the Title VII claims raised in the federal case. *See Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 183 (Cal.2001). But there are substantive differences. *Acuna v. Regents of University of Cal.*, 65 Cal.Rptr.2d 388, 395 (Cal.Ct.App.1997). Plaintiff, however, points to no difference between the statutes that makes the litigation of his particular harassment and promotion discrimination FEHA claims different from how he would have litigated his Title VII hostile environment and promotion discrimination claims. He also does not dispute that the issues on which his FEHA claims were resolved would ordinarily have been a sufficient basis for applying collateral estoppel to dismiss his Title VII claims.

Applying *res judicata* in this case did not deprive Plaintiff of having had an opportunity to litigate the

Title VII hostile environment and promotion discrimination claims. Plaintiff was not prejudiced by any late invocation of *res judicata* and allowing the Title VII claims to proceed would result in duplicative use of judicial resources and could produce inconsistent results if Plaintiff were successful following a remand. Therefore, the district court did not err in holding Defendant had not waived its *res judicata* defense.

AFFIRMED.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GEORGE McGINEST, Plaintiff, v. GTE, SERVICE CORP.; MIKE BIGGS; and DOES 1 through 100, inclusive, Defendants.	CASE NO. CV-99-13432 CAS (RZx) ~~[PROPOSED]~~ **JUDGMENT IN FAVOR OF DEFENDANT GTE** Date: March 7, 2005 Time: 10:00 a.m. Courtroom: 5 (Filed Apr. 26, 2005)

The motion of Defendant Verizon California, Inc., formerly known as GTE Service Corporation ("GTE"), for summary judgment or, in the alternative, partial summary judgment, pursuant to Federal Rule of Civil Procedure 56(b), came on regularly for hearing before this Court on March 7, 2005, and the evidence

presented having been fully considered, the issues having been duly heard and a decision having been fully rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Judgment is hereby entered in favor of GTE and against Plaintiff George McGinest ("McGinest") on the Complaint filed in this action;

2. McGinest shall take nothing from GTE; and

3. ~~GTE~~ Each side shall ~~recover~~ bear its costs of suit. ~~in the amount of $_____~~

DATED: 4/26/05

/s/ [Illegible]
UNITED STATES DISTRICT JUDGE

Submitted by:

EPSTEIN BECKER & GREEN, P.C.

By: /s/ Jennifer L. Nutter
JENNIFER L. NUTTER
Attorneys for Defendant Verizon California, Inc., formerly known as GTE service Corporation ("GTE")

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GEORGE MCGINEST, Plaintiff, vs. GTE SERVICE CORP.; MIKE BIGGS; and DOES 1 through 100, inclusive, Defendants.	Case No. CV 99-13432 CAS (RZx) **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Filed Mar. 29, 2005)

I. INTRODUCTION

Plaintiff George McGinest ("McGinest") brings claims against defendant GTE Service Corporation, the predecessor in interest of Verizon California, Inc. ("Verizon"), and Mike Begg ("Begg"), erroneously sued as Mike Biggs, for alleged violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). McGinest filed his original complaint who this Court on December 23, 1999, asserting a single claim for relief for alleged harassment, discrimination, and retaliation in employment in violation of 42 U.S.C. § 2000e *et seq.* On June 7, 2000, McGinest filed his first amended complaint ("FAC"). In that complaint, still under the rubric of a single claim for relief, he alleged that defendants were liable for (1) creation of racially hostile work environment in violation of 42 U.S.C.

§ 2000e-2(a); (2) failure to promote on account of race in violation of 42 U.S.C. § 2000c-2(a); and (3) retaliation in violation of 42 U.S.C. § 2000c-3(a).

On October 10, 2001, this Court granted defendants' motion for summary judgment. McGinest appealed this grant as to Verizon, but not as to Begg. On March 11, 2004, the United States Court of Appeals for the Ninth Circuit reversed this Court's grant of summary judgment as to the hostile work environment claim and the discrimination claim, affirmed the grant of summary judgment as to the retaliation claim, and remanded the case to this Court for further proceedings. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1125 (9th Cir. 2004).

Meanwhile, a parallel case brought by McGinest the day before the present action was filed was proceeding in California state court. That action was filed on December 22, 1999, in the Los Angeles County Superior Court ("Superior Court"), asserting violations of the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940 *et seq.* As noted below, it is undisputed by the parties that the state court action was brought against the same defendants as those named in this action, and is based on the same alleged events and conduct that form the basis of this action. Furthermore, McGinest and Verizon were each represented by the same counsel in the state action and the federal action.

The Superior Court granted summary judgment for defendants on January 22, 2002, and entered

judgment in their favor on January 28, 2002. On July 7, 2004, in an unpublished decision, the California Court of Appeal for the Second Appellate district affirmed the Superior Court's judgment in all respects. *McGinest v. Verizon California, Inc.*, No. B159252, 2004 WL 1510294 (Cal. Ct. App. July 7, 2004). The Court of Appeal took judicial notice of the Ninth Circuit's decision in this action, and invited the parties to submit supplemental briefs addressing the effect of the federal court litigation on the state court proceedings. Cal. Opin. at *4. The Court of Appeal noted that in the federal litigation, McGinest is "apparently relying on the same set of facts that he is alleging in his state court action under the FEHA." *Id.* The court ruled that the Ninth Circuit's reversal of summary judgment as to the hostile work environment and discrimination claims under Title VII was not binding upon it because it was not a final decision on the merits. *Id.* at *4-5. By contrast, the court held that the Ninth Circuit's ruling on the retaliation claim under Title VII was final and required to be given preclusive effect as to McGinest's parallel FEHA claim under principles of collateral estoppel. *Id.* On October 13, 2004, the Supreme Court of California denied McGinest's petition for review.

Defendant Verizon now brings a new motion for summary judgment based on the California Court of Appeal's decision, asserting that McGinest's remaining claims for harassment and discrimination are precluded under principles of *res judicata*. For the reasons set forth below, the motion is granted.

II. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the rerecord that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed. R. Civ. P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990). *See also Celotex Corp.*, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. *See also Abromson v. American Pac. Corp.*, 114 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court

must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec Serv,. Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita*, 475 U.S. at 587.

III. DISCUSSION

Verizon argues that under 28 U.S.C. § 1738, a state court judgment is to be given the same preclusive effect in a federal court as it would have in a court of that state. Mot. at 4.[1] Noting that the California Court

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[1] In connection with its motion, Verizon requests that the Court take judicial notice that McGinest filed his state court action in the Los Angeles Superior Court on December 22, 1999, and this action on December 23, 1999. The Court hereby takes judicial notice of these facts.

Verizon also requests that the Court take judicial notice of the following documents filed in the state court action and in this action: McGinest's amended complaint in the state court action (Exh. A); McGinest's First Amended Complaint (Exh. B); this Court's October 11, 2001 judgment in Verizon/GTE's favor

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of Appeal's decision is a final judgment on the merits, Verizon argues that under California law, by reason of the "primary rights" theory of the nature of a cause of action, the present action involves the same causes of action that were adjudicated in the state court

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(Exh. C); McGinest's notice of appeal of this Court's judgment, filed October 23, 2001 (Exh. D); the Superior Court's January 28, 2002 entry of summary judgment in Verizon/GTE's favor (Exh. E); McGinest's notice of appeal of the Superior Court's judgment (Exh. F); the Ninth Circuit's opinion in this action (Exh. G); the California Court of Appeal's July 7, 2004 opinion affirming the Superior Court's grant of summary judgment in the state action (Exh. H); McGinest's petition for review by the California Supreme Court, filed August 16, 2004 (Exh. I); and the California Supreme Court's denial of McGinest's petition, filed on October 13, 2004 (Exh. J). Verizon further requests, in connection with its reply, that the Court judicially notice the parties' Joint Report of Early Meeting of Counsel in this action (Exh. K), which states that "[t]here is currently a related action pending in the Los Angeles Superior Court . . . that is based on the same alleged facts and circumstances as the instant case," and a letter filed in the state action by McGinest's counsel, on April 29, 2004, in response to the California Court of Appeal's request for briefing regarding the preclusive effect of the Ninth Circuit decision on McGinest's state court action (Exh. L). The latter states, in pertinent part, "[a]s this Court accurately recount, '[i]n its opinion, the federal court addresses claims made by appellant in the context of a Title VII action for racial discrimination. It appears that appellant is making the same claims in this Court, in an action under [FEHA]' . . . McGinest's state harassment and disparate treatment claims under Title VII are based on the identical misconduct committed by GTE." The Court grants Verizon's request with respect to those documents relating to the state court action, namely, Exhs. A, E, F, H, I, J, and L. As to the remaining documents, because they are already part of the record of this case, Verizon's request is denied as unnecessary.

action. *Id.* at 4-5. Specifically, Verizon asserts that McGinest's federal claims and state claims both involve "the right to be free from employment discrimination." *Id.* at 5.

McGinest responds first that this action encompasses events that took place earlier than those which were the subject of the state court action. Pl's Resp. to Defendants' Statement of Undisputed Facts ("DSUF") ¶ 2. McGinest asserts that he filed a federal Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on June 3, 1997. *Id.* He further asserts that he filed his state Complaint of Discrimination with the California Department of Fair Employment and Housing ("DFEH") on December 22, 1999. *Id.* Thus, he contends that his claims in the instant action cover events from and after June 3, 1997, "without reference to the Continuing Violations Doctrine," whereas the state complaint only covered events from and after December 22, 1998, "again without reference to the Continuing Violations Doctrine." *Id.*[2] McGinest further argues that the state court did not properly consider significant incidents of discrimination and harassment in reaching its conclusion that "[t]he

[2] McGinest asserts that the state court "refused to apply the continuing violations doctrine and refused to consider events outside the statutory period," i.e., from December 22, 1998, to December 22, 1999. Opp. at 3 (citing Cal. Opin. at *5). McGinest also asserts that Verizon refused to stipulate to have the entire action heard in state court. Opp. at n.1.

incidents [McGinest] points to are speculative, innocuous, ambiguous, hearsay, or so sporadic and rare that they cannot be considered a routine or concerted pattern of racial harassment." Cal. Opin. at *8.[3] McGinest also urges that the Court is obligated to follow the Ninth Circuit's direction, and not that of the state courts. Opp. at 5-6. Finally, McGinest asserts that Verizon has not timely raised *res judicata* as an affirmative defense in its answer. *Id.* at

[3] McGinest specifically points to the following evidence: (1) non-African American relief supervisors received overtime payments for arriving "less than 5 minutes before their shifts," while McGinest "was refused pay for the overtime he actually worked"; (2) McGinest's request for the replacement of his tires, which he "expressly believed" was denied on account of his race; (3) racial epithets seen and heard by McGinest's African American colleagues, notwithstanding the California court's finding that "McGinest cannot claim to feel harassed by racial epithets that he never heard or saw," since "[a] plaintiff can establish a hostile work environment by evidence he is aware of harassment of others in the workplace"; (4) racially offensive graffiti, which McGinest alleges "appeared in areas which were used by, and accessible to, GTE's management," notwithstanding the California court's finding that McGinest had failed to notify management of the graffiti and that GTE could not be held liable for conduct of which it was unaware; (5) numerous instances in which the phrases "nigger," "digger," "PONTIAC" ("Poor Old Nigger Thinks It's a Cadillac"), and "White is right" appeared in GTE's bathroom; (6) Tom Hughes, allegedly McGinest's manager, called him a "stupid nigger"; (7) Paul Ledbetter, who allegedly uttered certain racist comments, was McGinest's supervisor. Pl's Resp. to DSUF ¶ 2; Opp. at 3-5.

7-8.[4] He argues that Verizon has therefore waived this defense.[5]

Pursuant to 28 U.S.C. § 1738, federal courts must give the "judicial proceedings [of any court of any state] . . . the same full faith and credit . . . as they have by law or usage in the courts of [the] State . . . from which they are taken." Under this statute, federal courts must "apply the *res judicata* rules of a

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[4] McGinest requests that the Court take judicial notice of GTE/Verizon's Answer, filed July 26, 2000; however, as it is part of the record of this case, the request is denied as unnecessary.

[5] Verizon contends that its *res judicata* defense did not exist at the time that it filed its answer in July 2000, and argues that it did not ripen until the California Supreme Court's denial, in October 2004, of McGinest's petition for review, when the Court of Appeal's order granting summary judgment became final. Reply at 8; *see also* 7 Bernard E. Witkin, California Procedure (4th ed. 2004), §§ 7 ("[A judgment] is not final so long as an appeal or motion for new trial is pending."), 307 ("A judgment . . . does not become res judicata until it is final in the . . . sense of being free from direct attack."). Verizon also points out that as soon as the California appellate court's opinion issued in July 2004, it asserted its *res judicata* defense in discussions with McGinest's counsel and at status conferences before this Court on July 16, September 8, and December 20, 2004. *Id.* Verizon therefore contends that McGinest could not have been surprised or prejudiced in any way by its raising this defense in the present motion. *Id.* at 9-10. The Court agrees that Verizon could not have raised *res judicata* as an affirmative defense until such time as the Court of Appeal affirmed the Superior Court's grant of summary judgment and the California Supreme Court denied McGinest's petition for review, and the Verizon provided clear and adequate notice to McGinest that it planned to pursue this defense at the earliest opportunity. Accordingly, the Court does not find that Verizon waived the defense of *res judicata*.

particular state to judgments issued by courts of that state." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988); *see also* Charles Alan Wright *et al.*, Federal Practice and Procedure § 4469 at 70-73 (West Group 2002). Further, the Supreme Court has held that a federal court adjudicating a Title VII action "should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of a[] [state] employment discrimination claim as meritless when the state court's decision would be res judicata in the State's own courts." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 463 (1982). *See also Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 76, 85 (1984) ("Section 1983 . . . does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims.")

Under California law, *res judicata* has a "double aspect." 7 Bernard E. Witkin, California Procedure § 281 (4th ed. 2004); *People v. Barragan*, 32 Cal. 4th 236, 252 (2004). In its primary aspect, also known as claim preclusion, a prior judgment is a complete bar on a new suit between the same parties on the same claim or cause of action; in its secondary aspect, also known as collateral estoppel, the prior judgment is not a complete bar to a new suit on a different cause of action,

> (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding

> resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.

Barragan, 32 Cal. 4th at 253.[6] In the present case, it is undisputed that the California Court of Appeal issued a final judgment on the merits of McGinest's FEHA causes of action, and that the parties in this action and the state court action are identical. The only questions are whether the claims in both actions are the same and whether McGinest could have presented his federal claims in the state court action.[7]

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[6] Because the Court finds, as discussed *infra*, that McGinest raises the same claims in the instant action as were raised in the state court action, the preclusion analysis is appropriately conducted within the framework of *res judicata*, in its primary aspect, rather than collateral estoppel. The Court notes, however, that in McGinest's state court action, the California Court of Appeal found that the Ninth Circuit's judgment on McGinest's Title VII retaliation claim had collateral estoppel effect on his parallel claim under FEHA. *See supra*. Courts have similarly applied collateral estoppel where the federal and state suits involved claims under federal law and FEHA, respectively. *See, e.g., Lumpkin v. Jordan*, 49 Cal. App. 4th 1223, 1231 (1996) (holding that federal judgment on claim of discrimination based on religion operated as collateral estoppel on FEHA claim and noting that "claims under FEHA and federal antidiscrimination remedies . . . are generally treated by courts as analogous"); *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1034 (9th Cir. 1994) (holding that administrative hearing on county employees termination had both *res judicata* and collateral estoppel effect on later § 1983 claim).

[7] California courts have also indicated that as a threshold matter, *res judicata* only applies where the court that issued the

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In determining whether the same claim has been raised for purposes of *res judicata*, California courts apply the "primary rights" theory, "under which the invasion of one primary right gives rise to a single cause of action. . . . Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief." *Slater v. Blackwood*, 15 Cal. 3d 791, 795 (1975) (citation and internal quotation marks omitted). *See also Acuña v. Regents of the Univ. of Cal.*, 56 Cal. App. 4th 639, 648 (1997) ("[T]wo actions constitute a single cause of action if they both affect the same primary right"); *Swartzendruber v. City of San Diego*, 3 Cal. App. 4th 896, 904 (1992) ("In determining the primary right, 'the significant factor is the harm suffered.'"). McGinest's Title VII claims and FEHA claims involve the invasion of the same primary right: "the right to be free of invidious employment discrimination." *Acuña*, 56 Cal. App. 4th at 649.[8] *Cf.*

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previous judgment had jurisdiction over the parties and the subject matter in dispute. *De Weese v. Unick*, 102 Cal. App. 3d 100, 105 (1980). Here, it is undisputed that the California courts could have exercised concurrent jurisdiction over McGinest's Title VII claims. *See Yellow Freight System, Inc., v. Donnelly*, 494 U.S. 820, 825-26 (1990); *Taylor v. Lockhead Martin Corp.*, 78 Cal. App. 4th 472, 483 (2000).

[8] In *Acuña*, cited by the California Court of Appeal in McGinest's case, the plaintiff brought claims in California state court under the ADEA, FEHA, and other California state law. The action was removed, and the federal court remanded the state claims to state court but kept the ADEA claim. The plaintiff subsequently added Title VII claims to his federal

(Continued on following page)

Johnson v. American Airlines, Inc., 157 Cal. App. 3d 427, 433 1984) (finding a female flight attendant's sex discrimination claim under state law precluded by a judgment in a federal class action challenging the same employment policy). Moreover, McGinest's claims in both his federal and state actions arise from precisely the same alleged facts over the same time period. *See* Def's Req. for Judic. Notice, Exhs. A (state court FAC), B (federal court FAC), ¶¶ 7-11.[9]

The Court therefore finds that under the California law of *res judicata*, McGinest's Title VII claims for discrimination and harassment are barred by the grant of summary judgment in his parallel FEHA claims. *Res judicata* applies "where a reasonable

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action. The federal court then granted summary judgment on the Title VII claims, which the state court found to preclude the plaintiff's FEHA claims.

[9] With regard to McGinest's assertions that the California Court of Appeal did not consider claims predating 1998, Verizon points out that the court did, in fact, consider the alleged events that occurred from 1995-98:

> We are not convinced that the claims arising from incidents in 1995 to 1998 were part of a continuing violation because the incidents are not similar in kind, nor did they occur with reasonable frequency. However, as we shall see in the next section, even if we consider the 1995 to 1998 incidents as part of a continuing violation, McGinest's claims still fail.

Cal. Opin. at *5. The Court notes that the California Court of Appeal declined to apply a continuing violation theory to the incidents that allegedly occurred in 1990. *Id.* However, this decision constitutes an evaluation on the merits of McGinest's 1990 claims.

opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy." *De Weese*, 102 Cal. App. 3d at 105 (citation, internal quotation marks, and emphasis omitted). McGinest had a reasonable opportunity to litigate his Title VII claims before the California courts, and the California courts have decided the controversy at issue. As these claims would be precluded in a California court, it follows that they are now barred.

The Court further notes that there was never any agreement between the parties that McGinest would litigate his Title VII claims in federal court and his FEHA claims in state court. Counsel for McGinest asserted in both his opposition and at oral argument that Verizon refused to stipulate to consolidate all of McGinest's claims in the state court action:

> THE COURT: Well, I guess the question I'm really asking is this. Was there ever any agreement between the parties that the state claims, the FEHA claims would be litigated in state court and Title VII claims in federal court?
>
> MR. COHN: We tried to stipulate that all of the matters should be heard in state court and the defendants refused that stipulation.
>
> . . .

> THE COURT: . . . I did want to know if there were any agreements.
>
> MR. COHN: No specific agreement. We tried to agree it would all be handled in state court. That stipulation was declined.

California courts have held that a defendant may be estopped from raising the defense of *res judicata* by his own conduct in the prior action, specifically, "where he induces his adversary to refrain from presenting an issue, or objects to its consideration." 7 Witkin Cal. Proc. Judgm. § 291. The Court observes that this rule appears to apply only to *res judicata* in its secondary aspect – that is, collateral estoppel – and not to cases where the same *claim* was previously litigated:

> The rule undoubtedly is that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined; the presumption being that all such issues were presented and decided.
>
> As to matters, however, which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged in that they were decided. This

> presumption . . . may be overcome by showing that although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or final determination of that action. If this is the situation here, defendant certainly cannot invoke the doctrine of *res adjudicata* against the assertion by plaintiff in this action of a right to the credit claimed. He cannot assert the conclusiveness of the former judgment on that matter if he consented with plaintiff that it might be withdrawn from consideration by the jury as an issue in the former action and it in fact was withdrawn.

United Bank & Trust Co. of Cal. v. Hunt, 1 Cal. 2d 340, 346 (1934) (citations and internal quotation marks omitted). Hence, it would appear that defendants cannot be estopped by their conduct in the prior suit where, as here, the Court has determined that the present suit involves *the same claims* that were raised and adjudicated in the prior action. *See Gamble v. Gen. Foods Corp.*, 229 Cal. App. 3d 893, 902-03 (1991) (rejecting plaintiff's argument that defendant, having opposed her motion to consolidate her state claim and title VII claim in federal court, was estopped from asserting *res judicata* in the state case, since the entire state claim was precluded); *but see Davies v. Krasna*, 12 Cal. App. 3d 1049 (1970) (holding that because defendant induced first trial to grant

nonsuit on claim, he was estopped from asserting *res judicata* in second trial.)

Even assuming *arguendo* that Verizon could be estopped from asserting its defense of *res judicata*, it's mere refusal to stipulate does not, in the Court's view, constitute conduct warranting such a measure. This is not a situation in which Verizon's conduct prevented McGinest from asserting his Title VII claims in state court, "thus preventing trial on the merits on a matter that could have been settled in the first trial." *Davies*, 12 Cal. App. 3d at 1055. Nor was "the course pursued by the trial court and by counsel in [the] earlier action . . . tantamount to an express determination on the part of the court with the consent of opposing counsel that certain issues should be reserved for future adjudication, and that res judicata did not apply." *Slater*, 15 Cal. 3d at 798. The trial court never made any determination that the Title VII issues should not be litigated. More importantly, nothing argued by McGinest explains why he could not have presented his Title VII claim in state court. He could have sought leave to amend his state court complaint if he had chosen to do so. Accordingly, the Court concludes that under principles of *res judicata* and full faith and credit, the California Court of Appeal's decision has preclusive effect as to McGinest's claims in the present action.

IV. CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Dated: March 29, 2005

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge